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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOHN W. DAVIS and JOSEPH LEO VEDDER, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners JOHN W. DAVIS and JOSEPH LEO VEDDER, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 3, 1966.

OPINIONS BELOW

The Opinion of the Court of Appeals (infra Appendix A) is reported at 357 F. 2d 438. No written opinion was delivered in the district court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1966 (infra Appendix B). A petition for rehearing filed by the United States was denied on April 18, 1966 (infra Appendix C). By order signed by Mr. Justice Black on May 16, 1966, the time for filing a petition for writ of certiorari in this cause was extended to and including June 17, 1966 (infra Appendix D). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1). The basis for federal jurisdiction in the District Court was 18 U.S.C. 1992 and 18 U.S.C. 371.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are as follows:

1. Sixth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix E.

2. Fifth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix F.

3. Fourth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix G.

STATEMENT OF THE CASE

The defendants, JOHN W. DAVIS and JOSEPH LEO VEDDER, were arrested by the F.B.I. late the night of March 12, 1964 (R. 26, 670, 783). They were initially taken to the F.B.I. office in Fort Pierce, Florida, which office is directly across from the St. Lucie County Jail (R. 670, 482). Thereafter they were taken before the United States Commissioner and bond temporarily

set for each in the amount of $75,000 (R. 80). Not being able to post bond in that amount, the petitioners were incarcerated in the St. Lucie County Jail pursuant to the usual custom in Florida whereby federal prisoners are restrained in state institutions (R. 199).

The petitioner, JOHN W. DAVIS, a resident of Fort Pierce, was able to contact his attorney whom he asked to represent him and petitioner JOSEPH LEO VEDDER at the preliminary hearing scheduled for the afternoon of the next day, Friday, March 13, 1964. Pursuant to this request, the attorney, Robert Jackson, came to the St. Lucie County Jail around noon on Friday, March 13, 1964, for the purpose of conducting his initial conference with his clients (R. 225-226). On his arrival at the jail Mr. Jackson was shown by the sheriff to the so-called attorney-client conference room, that is, the room customarily and regularly used by attorneys to consult with incarcerated clients (R. 226, 211, 213, 192-224). He there conducted his initial conference with petitioners Davis and Vedder after which he represented such petitioners at the preliminary hearing in the afternoon.

At the preliminary hearing the government, upon producing its evidence to show probable cause for binding the defendants over, requested the Commissioner to increase bail required by each of the defendants Davis and Vedder from $75,000 to the amount of $100,000 (R. 77, 80). The basis for this request was a statement by the Assistant U.S. Attorney present that the offense for which the defendants had been arrested was a particularly heinous one similar in nature to others of recent event which had attracted the attention of the president of the United States and had blackened the name of Florida before the nation; that

the government's investigation concerning such offenses was still continuing, as was investigation of the state law enforcement agencies; and that the continued incarceration of the defendants was necessary to insure the success of such investigations (R. 76-77, 79-80). As stated by the Assistant U.S. Attorney (R. 77):

> ". . . This has statewide ramifications, and if we allow these individuals to be free on bond that I think is ridiculous under the circumstances, suggested by Mr. Jackson, the whole investigation involving these, and I call them heinous crimes, is going to be possibly ruined and we will never know to the full extent that it has gone.
>
> "And I respectfully urge the commissioner to take into consideration the fact that all governmental agencies, not only the F.B.I., but certainly the agencies of the State of Florida, are concerned in this investigation, and it is continuing. . ."

Petitioners' attorney protested vigorously against such improper use of bail for the purpose of furthering an investigation (R. 77-79), and the United States Commissioner reduced bail from $75,000 to $50,000 (R. 80).

The petitioners were shortly thereafter indicted upon a three count indictment under 18 U.S.C. 371 and 18 U.S.C. 1992 (R. 1-5). Count I of the Indictment charged a conspiracy between the petitioners Davis and Vedder and two other named defendants to willfully derail, disable and wreck trains operated by the Florida East Coast Railway in interstate commerce. Count II charged that petitioners and the other two named defendants, on or about March 12, 1964, willfully placed dynamite on and near a railroad bridge in Indian River County approximately two miles south

of Vero Beach, Florida, with the intent to derail and disable trains operated in interstate commerce by the F.E.C. Railway. Count III charged that petitioners and the other two named defendants, in the Southern District of Florida, on or about March 11 and March 12, 1964, willfully attempted to derail, disable and wreck trains operated in interstate commerce by the F.E.C. Railway.

Shortly before trial, petitioners Davis and Vedder learned of circumstances which strongly suggested that certain of their private consultations with counsel, after their arrest and while confined in the St. Lucie County Jail, had been surreptitiously eavesdropped on and illegally intercepted by law enforcement officials of the State and Federal governments who were jointly engaged in urgent investigation to solve the rash of dynamitings on the strike-bound F.E.C. Railway (R. 179, 76-77). Specifically, petitioners learned that the attorney client conference room in the St. Lucie County Jail where they had been incarcerated by the F.B.I. after their arrest, had been deliberately equipped with concealed microphones and monitoring devices as shown by the plans and specifications for the recently built jail (R. 181-192). Asserting that interference with consultations with counsel under such conditions constituted denial of certain basic constitutional rights, the petitioners filed a motion seeking a hearing and requesting that charges against them be dismissed (R. 108-112). Initially the court refused to permit the motion to be filed and ordered it returned to counsel with instructions that it be presented to the court on the day set for the trial (R. 177-179). On the day set for trial, the government was prepared with a written memorandum in opposition (R. 112-113) which did

not, however, deny that eavesdropping had in fact occurred. The court immediately proceeded to take evidence and testimony upon the allegations contained in the motion (R. 179-230), at the conclusion of which the petitioners moved to compel the government to produce its investigative files (1) for in camera inspection by the petitioners or, in the alternative, (2) for in camera inspection by the court (R. 227-228). The court denied all motions without argument and without requiring the government to respond (R. 228, 230, 131), and the case proceeded to trial the next day (R. 231).

Petitioners Davis and Vedder immediately sought a writ of prohibition from the Court of Appeals, Fifth Circuit. The case was docketed as Davis vs. Choate, No. 21,725. After oral presentation and approximately a week's consideration the petition was dismissed on July 24, 1964, "without prejudice to petitioners' right to raise such questions as may be preserved by them touching on the issues sought to be presented to this Court by petition for writ of prohibition and/or mandamus." (R. 135-136).

The evidence presented before the Court in connection with the petitioners' motion to dismiss revealed that the St. Lucie County Jail, from its very inception, has been conceived and planned to be equipped with the latest type of equipment for surreptitious eavesdropping. As the plans and specifications for the jail, which was built in 1961-1962, disclosed, not only were various ceilings secretly equipped with hidden microphones, but, far more significantly, the attorney client conference room itself was bugged in two places —with a microphone in the ceiling ostensibly for intercommunications, and with a concealed microphone in a fake telephone sitting on the conference table itself

(R. 180, 226, 211-213). The setup was ingeniously cunning in that an attorney, perhaps suspicious of the intercom microphone in the ceiling, would naturally consult with his client by speaking down into the table, or in other words, directly into the concealed microphone in the fake telephone. These microphones in turn were connected to a monitoring device whereby conversations picked up from four different locations throughout the jail could simultaneously be recorded. The room was also equipped with two-way mirrors for surreptitious observation (R. 233).

The testimony of the sheriff of St. Lucie County, his son (who is his chief deputy) and other state law enforcement officers connected with the St. Lucie County Jail, did not disclose conclusively whether or not the conference between Mr. Jackson and his client on Friday, March 13, 1964 had in fact been illegally intercepted. The sheriff denied all knowledge of the bugging device in his jail (R. 195-196), although he finally admitted that he had "heard" about them without ever having seen them (R. 196). His son admitted using the bugging device on occasions while he was investigating but denied that he had any connection with petitioners' case (R. 210). The intercom operator denied knowledge of any recorded or monitored conversations being in existence and even denied knowing if any had ever been in existence (R. 215). He denied ever using the intercom system in the attorney client room (R. 222), a statement directly refuted by Mr. Jackson from his experience on March 13, 1964 (R. 225). In addition it was shown that the jail officials, on learning of petitioners' inquiries and attempts to find out about the jail's equipment, had advised the F.B.I. of petitioners' efforts in this regard and had

taken steps to frustrate and prevent the petitioners from learning the truth (R. 204-209).

The trial on the indictment against petitioners proceeded. The jury returned a verdict of guilty against the petitioners as to all three counts of the indictment (R. 134-135; 1318-1320). The court sentenced the petitioner, Davis, to five years on Count I and to ten years each on Counts II and III, sentences on Counts II and III to be concurrent but consecutive to sentence on Count I; or for a total of fifteen years (R. 1328-1329). Petitioner, Vedder, was sentenced to the same terms on each count, but with all to run concurrently, or for a total of ten years (R. 1329-1330).

The petitioners filed their appeal to the Court of Appeals, Fifth Circuit. In their appeal the petitioners presented the question, inter alia,

> WHERE DEFENDANTS IN A FEDERAL CRIMINAL CASE MAKE A PRIMA FACIE SHOWING THAT THEIR CONFERENCES WITH THEIR ATTORNEY, HELD AFTER THEIR ARREST AND INCARCERATION BY FEDERAL AUTHORITY AND PRIOR TO THEIR RELEASE ON BAIL, WERE SURREPTITIOUSLY OVERHEARD AND INTERCEPTED BY LAW ENFORCEMENT OFFICIALS THROUGH THE USE OF CONCEALED MONITORING DEVICES, IS NOT THE TRIAL COURT REQUIRED, BY BOTH THE CONSTITUTION AND BY A SOUND RULE FOR THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, TO COMPEL THE GOVERNMENT TO MAKE A REASONABLE SHOWING, BEFORE PROCEEDING TO TRIAL, THAT NO SUCH INTERCEPTED ATTORNEY-CLIENT COMMUNICATIONS WERE OVERHEARD BY FEDERAL AGENTS OR FURNISHED TO THEM BY STATE OFFICIALS INVOLVED IN THE SAME CRIMINAL INVESTIGATION OR USED IN ANY WAY IN THE FEDERAL INVESTIGATION AND PROSECUTION OF THE DEFENDANTS?

The Court of Appeals for the Fifth Circuit reversed the conviction of the petitioners. (R. 1366) The judgments entered against the petitioners based on Count III convictions were reversed with directions that Count III be dismissed. The judgments against the petitioners on Count I and Count II were reversed and remanded to the District Court. (R. 1366) The basis for the reversal of the judgments on Counts I and II was that the trial judge had made certain comments which infringed on the constitutional rights of the petitioners to remain silent. The Court of Appeals, Fifth Circuit, did not dispose of the question presented by the petitioners with respect to the alleged interception of attorney-client communications.

QUESTION PRESENTED

Where defendants in a federal criminal case make a prima facie showing that their conferences with their attorney, held after their arrest and incarceration by federal authority and prior to their release on bail, were surreptitiously overheard and intercepted by law enforcement officials through the use of concealed monitoring devices, is not the trial court required, by both the Constitution and by a sound rule for the administration of federal criminal justice, to compel the Government to make a reasonable showing, before proceeding to trial, that no such intercepted attorney-client communications were overheard by federal agents or furnished to them by state officials involved in the same criminal investigation or used in any way in the federal investigation and prosecution of the defendants?

REASONS FOR GRANTING THE WRIT

I.

The petition should be granted to consider important questions arising under the federal constitution which have not been, but should be, settled by this Court.

As hereinabove noted, the petitioners moved the trial court to compel the government to produce its investi-

gation files either for inspection by petitioners or for an in camera inspection by the court so as to insure that no confidential communications between themselves and their attorney had been intercepted by federal agents or by state law enforcement officers working with them and used in the prosecution of these petitioners. The court summarily denied these motions on the ground that even if a federal agent or other law enforcement officer had wrongfully invaded defendants' rights in this regard, such a violation would not affect the government's right to continue its prosecution of these petitioners (R. 228-227; 229, 230). Thereafter the court entered a formal order, without recitation of grounds, denying the petitioners' motion to dismiss (R. 131).

The right of an accused to the effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution and has been held to be one of the basic rights indispensable to the concept of ordered liberty protected against state infringement by the Fourteenth Amendment. *Escobedo* v. *Illinois,* 378 U.S. 478; *Gideon* v. *Wainwright,* 372 U.S. 335. If an accused is denied this basic right in a criminal proceeding, he cannot be deprived of life or liberty. *Glasser* v. *United States* (1942) 315 U.S. 60.

But fundamental and important as the right to assistance of counsel may be, to supply counsel to an incarcerated accused in a room elaborately equipped to overhear all of the confidential communications which normally and necessarily flow between the parties to such a relationship is a far grosser violation of fundamental rights than to deprive an accused of the assistance of counsel entirely. The complete deprivation of counsel is at least straightforward; it involves

only the denial of the rights preserved by the Sixth Amendment. The surreptitious interception of confidential communications between an attorney and his client, however, not only makes the assistance of counsel totally ineffective in violation of the Sixth Amendment, but in addition constitutes a complete perversion of the role of counsel from one of defense to one of secret prosecution. Assistance of counsel is converted into conviction by counsel. An accused's rights under the Fourth and Fifth as well as the Sixth Amendment are thereby flagrantly and disgustingly infringed.

A concealed microphone in an attorney client conference room in a jail is like a sawed-off shotgun—no legitimate purpose can be conceived in justification for it. It exists only for evil. It can be used only to deprive an inmate of his Constitutional right to the assistance of counsel, a right held by this Court in *Johnson* v. *Zerbst,* (1938) 304 U.S. 458, to be so fundamental that if it is not complied with, a court no longer has jurisdiction to proceed.

It is respectfully submitted that petitioners in this case presented to the trial court at least a prima facie case that their constitutional rights in this regard have been willfully infringed. When the rights are as fundamental as these, the quantity of proof necessary to alert a court to their protection should not be prohibitively high. Yet here, in the face of a strong showing, at least as to the likelihood that defendants' initial conference with their attorney had been "bugged" by law enforcement officers, the court below did not even require so much as a formal denial from the government. The defendants' motions were summarily denied on the basis that if some officer had infringed their

rights, the government could reap the benefit thereof without responsibility therefor. Such a holding is neither the law nor justice. *Coplon* v. *United States*, D.C. Cir., 191 F. 2d 749.

The petitioners respectfully urge the court to rule unequivocally that the Sixth Amendment, as well as the Fourth and Fifth Amendments, to the federal constitution, not only prohibit any eavesdropping upon attorney-client communications but also prohibit compelling an accused to confer with his counsel under conditions conducive to eavesdropping by law enforcement officers.

II.

The petition should be granted to consider questions of importance in the administration of justice in the federal courts. These questions have not only general importance in the administration of justice, but have a very immediate, current, concrete impact with respect to further proceedings in this case. The failure of the Court of Appeals to pass on the question here presented subjects the petitioners to the unconscionable burden of being tried again without an appellate determination of the extent to which their constitutional rights have been impaired by the conduct of the government, and what remedies for this invasion of their rights are available on the retrial, if, indeed, they may constitutionally be subjected to another trial at all.

Despite the fact that the trial judge did not require any response from the government, it is of at least some significance that when the defendants' motion was presented to the trial judge in open court, the government had prepared a written response thereto

which did not deny that eavesdropping had occurred but which stated only that defendants' motion was defective because not based upon a sworn affidavit that eavesdropping had in fact occurred and because it was "premature" until the government actually attempted to introduce "recordings" of defendants' confidences expressed to their attorney (R. 112-114). It is respectfully submitted, in all deference, that the response of the government did not meet the issue or reveal a sensitivity to the fundamental rights involved.

Moreover, at the hearing on defendants' motion itself, and after the trial judge had denied defendants' motions to compel the production of the government's investigation files for in camera inspection by the court, an Assistant United States Attorney did volunteer the meager response that "there were no such recordings of any conversation." (R. 228-229). Such a denial again failed to join issue with the basic question of whether there was eavesdropping and an interception of attorney client confidences.

This Court has a responsibility beyond the strict mandates of the Constitution to fashion rules for the fair administration of federal criminal justice. *McNabb* v. *United States*, 318 U.S. 332. Petitioners respectfully submit that in the discharge of this function this Court should require the government in a situation such as this to show affirmatively that no nefarious interception of attorney client communications in fact occurred. To require an accused to carry a heavier burden of proof than the one met by the defendants below would be to reduce the Constitutional guarantees of the Fourth, Fifth, Sixth and Fourteenth Amendments to sterile pronouncements. Petitioners in this case proved clearly and conclusively an illicit oppor-

tunity to eavesdrop on their confidential communications; the easy ability to do so; a strong motive to eavesdrop; the practice of eavesdropping; and in addition, efforts by the officials in charge of the St. Lucie County Jail to conceal from these very defendants the existence of the eavesdropping devices built into the attorney client room.

In the exercise of its function of supervising the administration of criminal justice in the federal courts, and to make certain that law enforcement officers never again resort to the tactics disclosed in this case, this Court should here and now promulgate the rule that upon a showing that any conference between an accused and his counsel is subjected to possible eavesdropping by means of concealed devices installed by law enforcement officers, such a showing vitiates any charge against the accused and deprives the federal court of jurisdiction to try the accused. The suppression of tainted evidence illegally seized has been developed to make a meaningful reality of the rights guaranteed by the Fourth Amendment; so too should the right of an incarcerated accused to consult without fear of illegal interceptions be brought to the consciousness of overzealous law enforcement officials who, in their quest for convictions, debase and pervert the very law they purport to uphold.

But should this Court decline to fashion such a wholesome rule, it is respectfully submitted that at the very least, in a situation such as this, the Constitution requires that the government files be produced for inspection by the defendants' counsel. If such examination of the government's files does not show that interceptions were made or used by the government, it still will not have removed from the United States

Government the shadow of a suspicion which more appropriately should fall upon governments which do not profess to revere Anglo-American concepts of due process. On the other hand, if examination discloses that defendants' attorney client communications were indeed intercepted then a revolting deprivation of fundamental Constitutional rights will have been prevented. The only question remaining would be to define the remedy. The following cases shed light on that problem:

In *Coplon* v. *United States* (C.A. D.C. 1950), 191 F. 2d 749, the Court stated on page 757 as follows:

> "If this occurred (interception of conversations between defendant and her counsel), it was a violation of appellant's constitutional rights. The Fifth Amendment enjoins that no person be deprived of life, liberty or property without due process of law. Such due process includes the right of one accused of crime to have the effective and substantial aid of counsel. Neufield v. United States (1941), 73 App. D.C. 174, 118 F. 2d 375, 383. Moreover the Sixth Amendment provides that 'in all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense.'
>
> "It is well established that an accused does not enjoy the effective aid of counsel, if he is denied the right of private consultation with them.
>
> * * *
>
> "We think it is further true that the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial. * * *"

In the *Coplon* case the Court of Appeals reversed the District Court's denial of the convicted defendant's motion for new trial, which raised the constitutional point for the first time since the defendant did not there learn about the interception of her communications to counsel until after the trial. The case was remanded to the District Court for consideration of defendant's motion for new trial in light of the Court's opinion, and thereafter the defendant's motion for new trial was granted. The government, however, declined to prosecute further since there was no way to remove the prejudicial effect of the violation of defendant's constitutional rights without revealing the government's investigative file, which the government refused to do. See also *United States* v. *Coplon* (C.A. 2, 1950), 185 F. 2d 629, 28 A.L.R. 2d 1041 (opinion by Judge Learned Hand).

In the case of *United States* v. *Denno* (C.A. 2, 1955), 221 F. 2d 626, it was contended that the defendant's fundamental rights were violated by the planting of a police officer in a seat reserved for spectators in the trial to overhear private and privileged communications between the parties and their attorneys during the trial. The Court held that if the allegation, without more, was supported by evidence which would justify such finding, then petitioner's fundamental rights had been denied.

In the case of *Caldwell* v. *United States* (C.A. D.C. 1953), 205 F. 2d 879, the prosecution officials planted an agent in the office of the attorney for the defendant and such agent had free access to the preparation and plans for the accused's defense. The Court held that a conviction tainted by conduct such as that shown as

indulged in by the government could not stand. See also *In re Bull* (D.C. Nev. 1954), 123 F. Supp. 389.

The case most strikingly parallel to the instant situation is *State of Washington* v. *Cory* (Wash. 1963), 382 P. 2d 1019, where the Washington Supreme Court stated as follows:

> "The record shows that the defendant, being unable to post bail, remained at the county jail from the time of his arrest throughout the trial and thereafter. A room was provided in the jail for consultations between prisoners and their attorneys. After the defendant had consulted with his attorney several times, he discovered that these conferences had been eavesdropped upon through a microphone installed in the conference room. *When this matter was reported to the trial court, it conducted an investigation and discovered that the conference room did contain a microphone and that the conversations were listened to by the sheriff and his officers.* At first they contended that only one tape was made of the conversations, but later they produced a second tape. The trial court ordered that these tapes be played for the defendant and his counsel and also directed that the prosecutor might hear the recordings." (Emphasis added)

The Court then considered what disposition of the case should be made in view of the showing of deliberate infringement of the defendant's constitutional rights. The Court commented upon the *Caldwell* case, *supra*, to the effect that it was not necessary for the defendant to show prejudice in order to secure a second trial, but that it would be necessary for him to show that he would be prejudiced in the second trial in order

to secure a final dismissal of the case. In commenting and ruling upon this proposition, the Court stated:

> "We do not appreciate the logic of this conclusion. There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be available in the second trial as in the first. If defendant's rights to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequences which fall upon their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy. * * *"

The Court held that in view of the shocking and unpardonable conduct of the law enforcement officials, the judgment of conviction should be set aside and the charges dismissed.

Petitioners respectfully commend to this Court's consideration the persuasive logic of the Washington Supreme Court. The federal government should not lag behind the states in matters such as this.

III.

The petition should be granted to consider questions of importance closely related to questions presently being considered by this Court in another pending case.

There is presently pending in this Court on petition for certiorari the case of *Fred B. Black, Jr., petitioner*

v. *United States of America,* No. 1029 (October Term 1965), which case involves questions relating to eavesdropping upon client-attorney conversations. In the Memorandum for the United States filed in such case, the Solicitor General recognized the right of the petitioner in such case to a judicial determination as to whether the monitoring of conversations between petitioner and his attorney had any effect upon his conviction. The Solicitor General stated:

> "At an appropriate hearing, the government proposes to submit all of the facts upon which a full judicial determination can be made."

The determination made by this Court in such case as to the rights of the defendant, and the procedures which should be followed, could have an important bearing upon the right of these petitioners. Further, by considering the factual situation in the instant case in connection with that of *Black* v. *U. S.,* No. 1029, this Court may fashion a comprehensive rule governing all interceptions, or attempts at interception, of client-attorney communications, whether made prior or subsequent to arrest.

Petitioners Davis and Vedder submit that they, upon their prima facie showing of monitoring of client-attorney conversations, were entitled to an order requiring the government to submit all of the facts upon which a full judicial determination could be made.

These petitioners respectfully submit that this Court should dispel any doubt as to the rights of accused persons by ruling that at the very least upon a prima facie showing of interception of client-attorney communications, the government is required to establish

affirmatively, by the production of its entire investigative files for examination, that no interception occurred.

CONCLUSION

Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21862

JOHN W. DAVIS, HUGH WINN, JOHN KATSIKOS, and JOSEPH LEO VEDDER, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court for the Southern District of Florida.

(March 3, 1966.)

Before JONES and BELL, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge: This is an appeal from judgments entered upon jury verdicts of guilty. The prosecution of appellants Davis, Winn, Katsikos, and Vedder was upon an indictment under 18 U.S.C. § 371 and 18 U.S.C. § 1992.[1] Specifically, Count I charged that appellants con-

---

[1] § 371 provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

§ 1992 provides: "Whoever, willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate . . . commerce by any railroad; or

"Whoever willfully . . . places explosives on or near . . . any . . . bridge . . .; or

"Whoever willfully attempts to do any of the aforesaid acts or things—

"'Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

spired to wilfully derail, disable and wreck trains operated by the Florida East Coast Railroad (hereafter FEC); Count II charged that appellants wilfully placed dynamite near a bridge with intent to derail trains operated by the FEC; Count III charged that appellants attempted to derail FEC trains.

Appellants Davis and Vedder were convicted on all three counts. Davis was sentenced to five years on Count I, and ten years on Counts II and III to run concurrently. Vedder received ten years on each count to run concurrently. Appellants Winn and Katsikos were found guilty on Count III and were sentenced to five years, four and one-half years of which was to be probated.

Our disposition of this appeal makes it necessary for us to consider only two of the many questions presented by defendants. These questions are: (1) was Count III unconstitutionally vague and indefinite; and (2) were the defendants' rights to remain silent violated by certain comments made by the trial judge.

I

The legal sufficiency of Count III of the indictment was challenged by appellants by their motion to dismiss the indictment and by their motion in arrest of judgment, both of which were denied. Count III provides:

> On or about March 11 and March 12, 1964, in the Southern District of Florida, the defendants, John Wesley Davis, Joseph Leo Vedder, John Katsikos, and Hugh Winn, did wilfully attempt to derail, disable and wreck trains, engines and cars used, operated and employed in interstate commerce by the Florida East Coast Railroad in violation of Title 18, U.S. Code, Section 1992.

The criteria by which the legal sufficiency of an indictment is determined are whether it contains the elements

of the offense charged and apprises the accused of the nature of the charge, so as to enable him to prepare a defense and to plead the judgment. *Russell* v. *United States,* 369 U.S. 749; *United States* v. *Debrow,* 346 U.S. 374; *Van Liew* v. *United States,* 321 F. 2d 664 (5th Cir. 1963); *Beitel* v. *United States,* 306 F. 2d 665 (5th Cir. 1962); *United States* v. *Strauss,* 285 F. 2d 953 (5th Cir. 1960); *Kreuter* v. *United States,* 218 F. 2d 532 (5th Cir.), *cert. denied,* 349 U.S. 932 (1955); *Keslinsky* v. *United States,* 12 F. 2d 767 (5th Cir. 1926).

These judicial principles have descended from the constitutional provisions declaring that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . . ." U.S. Const., amend V. And "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." U.S. Const., amend. VI. The essence of these principles of due process is embodied in a simple rule, which provides that an indictment shall be "a plain, concise and definite written statement of the essential facts constituting the offense charged." F.R. Crim. P., Rule 7(a), 18 U.S.C. § 1917.

We conclude that Count III of the indictment does not inform the defendants of the nature and cause of the accusation with such reasonable certainty that they could have made an adequate defense and protected themselves after judgment against another prosecution on the same charge. The language is not specific enough to state a single offense. Count III could refer to the same events which form the

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[2] The requisite specificity can be achieved by incorporation of another count, but this must be expressly done. See *Walker* v. *United States,* 176 F. 2d 796 (9th Cir. 1949); *United States* v. *Gordon,* 253 F. 2d 177 (7th Cir. 1958).

basis of the first two indictments,[2] or it could refer to a completely different set of circumstances. The use of the word "trains" and the failure to specify even the approximate location where the attempt took place are particularly objectionable since they subject appellants to unwarranted speculation:

> "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and specific offense, coming under the general description, with which he is charged. . . ."[3]

Count III should have been dismissed.[4]

II

Appellants Vedder and Davis allege that certain comments by the trial judge infringed their constitutional right to remain silent. We agree.

During the course of the cross-examination of the government's chief witness, a paid informer, counsel for Vedder and Davis, sought to impeach the witness by showing that he had a financial interest in having appellants convicted beyond the payments admittedly received, and attempted to cross-examine with regard to what the witness had said transpired between himself and Vedder and Davis in connection with their plans and efforts to derail the trains. The trial judge sustained the objections to the cross-examination and commented in the presence of the

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[3] *Russell* v. *United States, supra* at 765.

[4] Reversal based on insufficiency of Count III will result in the release of defendants Winn and Katsikos based upon their convictions. Since the sentences of Davis and Vedder on Count III run concurrently with those on Count II, they will not be affected by this action except upon a new trial.

jury that counsel could not impeach the witness, but could put "your people" on the stand.[5]

The rule that defendant's refusal to testify may not be commented on is, of course, based on the Fifth Amendment, and its statutory analogue, § 3481 of Title 18, United States Code.[6] This principle has been given elaborate analysis in recent decisions of both this Court and the Supreme Court. See, for example, *Griffin* v. *California*, 380 U.S. 609 (1965); *Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52 (1964); *De*

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[5] Q. (R. 541): Mr. Becker, I will ask you if you ever made a proposition to either the defendants Davis or Vedder concerning the spreading of the rails of the FEC railroad with a jack in order to cause a derailment.

MR. MEADOWS: I object . . . .

THE COURT: Sustained. It's the same old testimony. Strike the testimony of counsel. It assumes a state of facts not in the record. It is completely outside the direct examination. You can have your people and they can testify if you want them to what this man did, if he did anything.

. . . .

Q. (R. 541): Did you remove from the property of the Clearwater Paving Company a jack for the purpose of spreading the rails of the FEC railroad?

THE COURT: Quit that now; you know better than that . . . . You don't want to call your own witnesses. You want to testify. You call your witnesses to testify.

. . . .

THE COURT (R. 543-44): Call your own witnesses. This man doesn't happen to be your witness at this time. You can call him, of course, if you want to.

. . . .

THE COURT (R. 544): And it may be that your people are wrong. Bring them up here and put them under oath, whoever told you any such thing, and we will look into it.

[6] § 3481 provides: "In the trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Luna v. *United States*, 308 F. 2d 140 (5th Cir. 1962). Just as it is improper for the prosecutor to argue from defendant's silence, so is it improper for the trial judge to call attention to a defendant's silence.[7]

> What the jury may infer, given no help from the court, is one thing. What it may infer when the court so solemnizes the silence of the accused into evidence against himself is quite another.[8]

It is important to observe that the rule does not prohibit all comment on testimony or evidence which stands uncontradicted, and the right to make such statements is well established. See, for example, *Jordan* v. *United States*, 324 F. 2d 179 (5th Cir. 1963); *Garcia* v. *United States*, 315 F. 2d 133 (5th Cir. 1963); *Fowler* v. *United States*, 310 F. 2d 67 (5th Cir. 1962); *Smith* v. *United States*, 234 F. 2d 385 (5th Cir. 1956); *Jamail* v. *United States*, 55 F. 2d 216 (5th Cir. 1932). The facts and circumstances of each case must be carefully analyzed to determine "whether the language used was manifestly intended and was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F. 2d 168, 170 (10th Cir. 1955); see *United States* v. *Fay*, 349 F. 2d 957 (2d Cir. 1965).

On the record before us, we can think of no effect of the trial judge's comments other than to invite the jury's attention to the fact that Vedder and Davis had not taken

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[7] In *United States* v. *Gainey*, 380 U.S. 63 (1965), in a dissenting opinion, Douglas, J., observed: "[U]nder 18 U.S.C. § 3481, the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or if the defendant sees fit, he may choose to have no mention made of his silence by anyone. *Bruno* v. *United States*, 308 U.S. 287." 380 U.S. at 73.

[8] *Griffin* v. *California*, *supra* at 614.

and did not take the witness stand. Here, no one but Vedder or Davis—or both—could have contradicted the government's witness as to the events about which he had testified and upon which he was being cross-examined at the time of the trial judge's remarks.

Accordingly, the judgments entered against Vedder and Davis on Counts I and II are reversed and remanded to the District Court. The judgments entered against the defendants based upon the Count III convictions are reversed with directions that Count III be dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 21862

D C. Docket No. 64-174-Criminal-EC

JOHN W. DAVIS, HUGH WINN, JOHN KATSIKOS, and JOSEPH LEO VEDDER, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeals from the United States District Court for the Southern District of Florida.

Before JONES and BELL, Circuit Judges, and JOHNSON, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments entered against

Vedder and Davis on Counts I and II in this cause be, and the same are hereby reversed and remanded to the District Court and that the judgments entered against the defendants based upon the Count III convictions are reversed with directions that Count III be dismissed, in accordance with the opinion of this Court.

March 3, 1966

Issued as Mandate:

APPENDIX C

(Filed April 18, 1966)

[29]—Johnson

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21862

JOHN W. DAVIS; HUGH WINN, JOHN KATSIKOS, and JOSEPH LEO VEDDER, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Florida.

(April 18, 1966)

On Petition for Rehearing

Before JONES and BELL, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM:

It is ORDERED that the appellee's Petition for Rehearing in the above-entitled and numbered cause be, and the same is, hereby DENIED.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ..., October Term, 1965

JOHN W. DAVIS and JOSEPH LEO VEDDER, *Petitioners*,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 17, 1966.

/s/ HUGO L. BLACK
Associate Justice of the Supreme court of the United States

Dated this 16th day of May, 1966

APPENDIX E

Constitution of the United States Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F

Constitution of the United States Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

Constitution of the United States Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 245

JOHN W. DAVIS AND JOSEPH LEO VEDDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and two others were convicted on three counts of derailing, disabling and wrecking trains in violation of 18 U.S.C. 371 and 1992. The court of appeals reversed the convictions on Counts I and II on the ground that the trial court's comments during trial infringed upon petitioners' constitutional right to remain silent, and remanded for a new trial. The convictions on Count III were reversed on the ground that the indictment was not legally sufficient. 357 F. 2d 438. We submit that there is no occasion for review by this Court of the interlocutory decision remanding for a new trial.

225-217—66

Petitioners were arrested in St. Lucie County, Florida by federal officers on March 12, 1964. Since petitioners could not post the bail set by the commissioner, they were taken to the St. Lucie County Jail, in accordance with the usual practice in Florida of keeping federal prisoners in State institutions (R. 199).[1] Petitioners' attorney conferred with them the next day in the attorney-client conference room of the jail (R. 224–225). At a hearing on petitioners' motion to dismiss the indictment, it was revealed that the room was equipped in such a manner that any conversation taking place in it could be monitored and tape recorded (R. 209–210). The chief deputy sheriff testified that, to his knowledge, no conversation in the attorney-client room had ever been monitored (R. 210), and that no F.B.I. agent was at the jail on March 13, 1964 (R. 212). The sheriff testified that he knew of no recordings made of the conference in question, and that there had been no request made of him to monitor any of petitioners' conversations by the F.B.I. or any other federal officer (R. 198, 201, 202). He considered petitioners to be federal prisoners and did not interrogate them or deal with them in any way other than to keep them in custody (R. 198). The deputy in charge of the radio equipment at the jail testified that he knew of no recording made of the conference (R. 215). Petitioners, as the moving parties, had subpoenaed but did not call F.B.I. agent Harry Morgan, who was prepared to testify

[1] "R." refers to the record on appeal, which includes a transcript of the trial.

that there were no recordings of the conversations in question (R. 228–229). Petitioners requested the right to inspect the government's investigative file or in the alternative to have the court inspect the file (R. 227). The request was denied, as was the motion to dismiss (R. 230).

1. Petitioners' argument that the government should be precluded from retrying them because of the mere possibility that a conference between attorney and client was overheard is without merit. The evidence presented at the motion to dismiss revealed only that the county jail was equipped for sound. There was no testimony that any conversations of petitioners were overheard. On the contrary, the sheriff testified that he considered petitioners to be federal prisoners as to whom he would take no action (other than the necessary acts of custody) without instructions—and that he had never received any request from the government to listen in on petitioners. The government should not be precluded from trying petitioners simply because a county jail, used for convenience, is equipped for sound surveillance.

2. Petitioners' complaint that the hearing before the district court did not adequately explore the eavesdropping issue is premature. In remanding on other grounds, the court below did not reach or discuss this issue. On retrial, petitioners will again have an opportunity to establish their allegations of eavesdropping. At such a hearing they may call as witnesses the F.B.I. agent who investigated the case and other federal officers who might have relevant information—a step petitioners have so far declined to take. If

petitioners' allegations are rejected, and they are again convicted, they can seek relief from the court of appeals. If the court affirms their conviction, this issue will then be ripe for review here.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966